

No. _____

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT COURT**

**INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
LOCAL UNION 230,
Petitioner,**

v.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
Respondent,**

**CITY OF SAN JOSE
Real Party in Interest**

**PETITION FOR WRIT OF PROHIBITION, MANDATE OR OTHER
APPROPRIATE WRIT RELIEF AND REQUEST FOR IMMEDIATE
STAY; MEMORANDUM OF POINTS AND AUTHORITIES
IMMEDIATE STAY REQUESTED**

**(Writ Regarding Order By The Santa Clara County Superior
Court; Case No. 1-12-CV-237635, Department 20, Phone Number:
408-822-2320; The Honorable Kevin E. McKenney, Presiding)**

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APPELLANT/PETITIONER: International Association of Firefighters, Local Union 230 RESPONDENT/REAL PARTY IN INTEREST: Superior Court of the State of California, County of Santa Clara	FOR COURT USE ONLY
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): International Association of Firefighters Local 230

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 23, 2013

Christopher E. Platten, Esq.
 (TYPE OR PRINT NAME)


 (SIGNATURE OF PARTY OR ATTORNEY)

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**PETITION FOR WRIT OF PROHIBITION OR MANDATE, OR
OTHER APPROPRIATE WRIT RELIEF AND REQUEST FOR
IMMEDIATE STAY**

**TO THE HONORABLE PRESIDING JUSTICE AND THE
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF
APPEAL FOR THE STATE OF CALIFORNIA, SIXTH APPELLATE
DISTRICT:**

Petitioner International Association of Firefighters, Local Union 230 (Union) petitions this Court for writ of prohibition, mandate or other appropriate writ relief ordering respondent Superior Court to stay its order dated June 17, 2013 compelling interest arbitration pursuant to the San Jose City Charter, as amended by "Measure B." (A true and correct copy of the Superior Court's order is found in the Appendix ["Appx."] at pp. 455-460. A true and correct copy of Measure B is found in Appx. at pp. 188-204.) Petitioner Union seeks a stay until resolution of the bad faith bargaining complaint between the Union and the City before the California Public Employment Relations Board (PERB), in Case No. SF-CE-969-M. (Appx. at pp. 417-419.) The PERB complaint challenges the validity of Measure B, placed on the June 2012 ballot by City Council adoption of Resolution N. 76158 (Appx. at p. 300.) The decision by the PERB may strike the provisions of Article XV-A of the Charter, as provided under Measure

B, and make the interest arbitration unnecessary or an award by the interest arbitration panel invalid.

The trial court's refusal to stay the arbitration proceeding pending resolution of the unfair practice claim before the PERB fails to accord appropriate deference to the PERB's exclusive jurisdiction; fails to acknowledge the risk of conflicting rulings requiring a stay; and erroneously requires that the Union must show a probability of success on its claim before the PERB. For these reasons, this Court should issue the emergency stay and writ relief requested.

By this verified petition, petitioner alleges as follows:

INTRODUCTION

Petitioner seeks relief to preserve the exclusive jurisdiction of the PERB to determine the validity and enforceability of the San Jose Charter Article XV-A, Sections 1501-A et seq. before requiring the Union and City to engage in an expensive and time-consuming interest arbitration over the provision of retirement benefits, disability pension benefits and retiree health benefits for future firefighters. The provisions of Charter sections 1501-A et seq. arise from the June, 2012 voter adoption of San Jose ballot Measure B. (See, *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1172.) The PERB

has issued a complaint, requiring trial before an administrative law judge, on the charge that the City placed Measure B before the voters without first fulfilling its statutory obligation to bargain in good faith with the Union. If the PERB sustains the complaint, then the provisions of Measure B, including those pertaining to future firefighters will be unenforceable under the holding in *The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.

PARTIES

1. Petitioner Union is the exclusive bargaining representative for firefighters employed by the City pursuant to the Meyers-Millias-Brown Act (MMBA), Government Code sections 3500 et seq.

2. Respondent Superior Court of Santa Clara County compelled interest arbitration regarding the provision of retirement benefits for future firefighters employed by the City, despite the pending administrative proceeding before the PERB to determine the validity and enforceability of Charter sections 1501-A, et seq.

3. Real party in interest City of San Jose is a municipal government that operates under the authority of the San Jose City

Charter. Under the Charter, the MMBA and the decision in *The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, the City is obligated to bargain in good faith prior to placing before the voters an amendment to the Charter effecting matters within the scope of representation, e.g., retirement benefits for firefighters. If real party in interest is not restrained from doing so, it will present before an interest arbitration panel a fait accompli by imposing retirement benefits on future firefighters capped at those levels provided under Charter § 1508-A ("Tier 2"), § 1509-A ("Disability Benefits") and § 1512-A ("Retiree Healthcare"). Absent voter approval, this is the limit of the arbitration panel's binding authority to award under § 1504-A. (See, Appx. at p. 191.)

JURISDICTION AND VENUE

4. Petitioner brings this action as a petition for writ of prohibition/mandate or other appropriate writ relief pursuant to Code of Civil Procedure sections 1085, 1281.2, and Rule 8.485 et seq. of the California Rules of Court. The Code of Civil Procedure, section 1281.2 provides, in pertinent part, that if there are issues between petitioner and real party in interest which are not subject to arbitration, but are the subject of a pending special proceeding

between the petitioner and the respondent, and if determination of the issues in the special proceeding may make the arbitration unnecessary, then the court may delay the order to arbitrate until the determination of the special proceeding. The PERB has exclusive jurisdiction to determine whether Measure B was lawfully placed before the voters consistent with the City's obligation to bargain. Thus the PERB has exclusive jurisdiction to determine whether Measure B was validly enacted and therefore enforceable. The Court should stay the interest arbitration proceeding and avoid the waste and unrecoverable expense inherent in an interest arbitration until the PERB determines the lawfulness of the charter amendments created by Measure B.

FACTUAL BACKGROUND

5 Beginning in mid-2011, the Union and the City bargained over the establishment of pension benefits for future employees. In late 2011, the City declared an impasse in those negotiations, even though its' bargaining proposals consisted of only proposed amendments to the City Charter.

6. On March 6, 2012, the City Council adopted Resolution No. 76158 placing on the June 2012 ballot Measure B, providing for

the enactment of Charter Sections 1501-A et seq. (Appx. at p. 300.) Absent voter approval, Measure B limits retirement benefits for future firefighters. (See, Charter § 1504-A, Appx. at p. 191; see also, *McDonough v. Superior Court*, supra at p. 1172.)

7. Prior to March 6, 2012, the Union proposed that retirement benefits for future firefighters be either per contract with the California Public Employees' Retirement System (CalPERS) or at a level of benefits consistent with those provided to firefighters hired on and after January 1, 2013 as established by the California Public Employees' Pension Reform Act of 2012 (PEPRA), Stats. 2012, ch. 296. The Union sought to ensure that the City not be placed at an economic or competitive disadvantage by providing retirement benefits less than those statutorily in place for the vast bulk of firefighters employed by municipal departments and special districts throughout the Bay Area and the State of California. Measure B creates a 2% at age 60 benefit for prospective San Jose Firefighters with a 1.5% cost of living adjustment post retirement. Measure B caps the total benefit at 65% of employee's compensation. In contrast, under the PEPRA, firefighters first employed on and after January 1, 2013 receive a pension benefit no less than a 2% at age 57 benefit

with a 2% annual cost of living adjustment post retirement. The retirement benefits provided for prospective firefighters under Measure B are inferior to those required under the PEPRA.

8. Measure B limits eligibility for disability retirement benefits for future employees. Under Charter section 1509-A, an employee will not be eligible for disability retirement if a panel of medical "experts," appointed by the City Council, determines that the employee is capable of engaging in any gainful employment for the City even if there are no such job openings for the employee. (Appx. at p. 199.) This is an irreparable harm to future firefighters rendered disabled by their employment as firefighters.

9. Measure B, Charter section 1512-A, reserves to the City the right to cancel any retiree healthcare plan or benefit, and expressly provides that no retiree health care plan or benefit is a vested right guaranteed to future firefighters. (Appx. at p. 201.) This is an irreparable harm to future firefighters.

10. Measure B, Charter section 1504-A limits the binding authority of an interest arbitration panel, operating under Charter section 1111, to award retirement benefits to future firefighters beyond the limits otherwise set forth in Article XV-A. (Appx. at p.

191.) An arbitration under Charter section 1111 is "subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure to the extent that such procedures do not conflict with this Charter Sections." (Appx. at p. 230.)

11. On December 21, 2012, the City filed a petition for writ of mandate and a petition to compel interest arbitration in the Superior Court of Santa Clara County, over the bargaining impasse between the Union and the City in order to implement the maximum permissible retirement benefits to future firefighters under Measure B. (Appx. at pp. 228-238.) Measure B provides for interest arbitration of impasses in bargaining over retirement benefits, but limits the interest arbitration panel's authority under pre-existing charter provisions found in § 1111. (Appx at p. 191.) Under § 1111, interest arbitration is held before a three person panel comprised of one arbitrator selected by the Union, one arbitrator selected by the City and one neutral arbitrator selected by the parties. (*Id.*, at p. 230.)

12. On February 19, 2013, petitioner filed its answer and cross-petition for writ of mandate, prohibition or other appropriate writ relief challenging the existence of a bargaining impasse between the Union and the City requesting a stay of the proceedings until

resolution of the PERB complaint in Case No. SF-CE-969-M. (Appx. at pp. 248-287.) On February 20, 2013, the Union filed a Notice of Related Case, identifying the litigation in *San Jose Police Officers Assn., et al v. City of San Jose, et al*, Santa Clara County Superior Court Case No. 112-CV-225926. This related case involves six separate actions, consolidated for trial before the Honorable Patricia M. Lucas. It is set for trial on Monday, July 22, 2013 and will determine, among other issues, whether Measure B constitutes an unconstitutional impairment of pension benefits to plan participants, both active and retired, of the San Jose Police and Fire Retirement Plan as of the effective date of Measure B.

13. And on February 20, 2013, petitioner filed its pleadings in support of a motion to stay consideration of the petition to compel arbitration or interest arbitration. (Appx. at pp. 288-391.)

14. The Honorable Kevin E. McKenney heard argument in the case on March 18, 2013. (A true and correct Reporter's Transcript of the hearing is found at Appx. at pp. 464-484. The transcript was not received by counsel until July 5, 2013.)

15. On June 17, 2013, the trial court issued an order compelling interest arbitration and writ of mandate and denying the

Union's request for stay of the arbitration proceedings pending resolution of the PERB complaint. (Appx. at pp. 455-460.) The trial court retained jurisdiction to resolve any dispute over selection of the neutral arbitration panel member. (Id., at p. 460.)

16. The trial court abused its discretion in denying the Union's request for stay since the PERB proceedings create a clear and present conflict over the underlying validity of Measure B. This conflict, if resolved by the PERB in the Union's favor will eviscerate the enforcement of Measure B entirely. The trial court erred by determining that it could not "conclude that [the Union] will be successful" in its complaint before the PERB over the invalidity of Measure B (id., at p. 459) since that is not the standard for determining if a stay of arbitration is appropriate.

17. Compelling interest arbitration under Measure B prior to resolution of the PERB complaint will force the Union to expend unnecessary and unrecoverable resources, including but not limited to attorney's fees, arbitrator fees, court reporter fees and expert witness fees to participate in the interest arbitration proceedings. Since the interest arbitration proceedings will be limited by Measure B to provide benefits limited under Measure B to future firefighters,

these prospective employees will be exposed to irreparable harm should the PERB later determine that Measure B is invalid, it may be contested as to what retirement benefits these employees are entitled.

18. On June 28, 2013 the trial court issued a status review order requiring the parties to appear on August 29, 2013. (Appx. at p. 485.) This is consistent with the trial court's ruling that absent agreement by the parties, the trial court shall select the interest arbitrator pursuant to Code of Civil Procedure section 1281.6. (Appx. at p. 460.)

FIRST CAUSE OF ACTION
(Entitlement to a Stay of Arbitration Pending Resolution of the
PERB Complaint Under Code of Civil Procedure § 1281.2 (c))

19. Petitioner hereby realleges and incorporates paragraphs 1 through 18 above as if fully set forth herein.

20. A stay of the interest arbitration is warranted because the precise provisions of the Code of Civil Procedure permitting a stay are extant and because it would be an abuse of discretion to require the Union to expend unrecoverable expenses to arbitrate over employment conditions that may be found invalid and unenforceable. Further, prospective firefighters should not be exposed to the

possibility of irreparable harm should the PERB determine that Measure B is invalid because the City may contest what retirement benefits, if any, these employees later become qualified to enjoy. Section 1281.2 of the Code of Civil Procedure provides, in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless . . . (c) . . . there is a possibility of conflicting rulings on a common issue of law or fact. . . . [¶] If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies."

21. The PERB complaint poses not only the possibility of conflicting rulings on the scope of issues under which the interest arbitration panel has binding authority, but if upheld, invalidates the provisions of Measure B entirely. The interest arbitration proceeding thus ordered by the trial court becomes a nullity.

22. Because the trial court's order compelling arbitration is a non-appealable order, (*Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63; see also, Code of Civ. Proc. § 1294), the Union has no plain, speedy or adequate remedy in the normal course of law. If forced to interest arbitration, the Union's expenses, including attorneys' fees, and costs, inclusive of its share of the arbitrator's fee, will be non-recoverable if the PERB later invalidates Measure B.

WHEREFORE, petitioner prays for judgment as follows:

1. That this Court issue an immediate stay prohibiting the interest arbitration until such time as the resolution of the PERB complaint in Case No. SF-CE-969-M is final.

2. That this Court issue its writ of prohibition/mandate or other appropriate writ relief staying the trial court's order compelling arbitration under the San Jose City Charter until such time as the resolution of the PERB complaint in Case No. SF-CE-969-M is final.

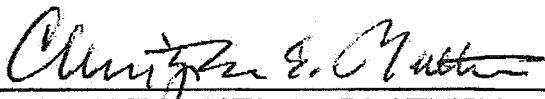
3. That this Court grant petitioner its reasonable attorneys' fees and costs.

4. That this Court grant such other, different and further relief as the Court may deem just and proper.

Dated: July 23, 2013

Respectfully submitted,

WYLIE, McBRIDE,
PLATTEN & RENNER



CHRISTOPHER E. PLATTEN

Attorneys for Petitioner International Association of
Firefighters, Local 230

VERIFICATION

I, Christopher E. Platten, declare:

I am one of the attorneys for petitioner International Association of Firefighters, Local 230. I make this verification for the reason that the officers of Local 230 are unavailable to verify this writ petition. I have read the foregoing Petition for Writ of Prohibition, Mandate or other Appropriate Writ Relief and Request for Immediate Stay and I believe that the matters therein are true and on that ground allege that the matters stated therein are true.

I further declare that the filing of this petition has been delayed while I awaited receipt of the court reporter's transcript of the March 18, 2013 hearing before the trial court, and then again by the death of my brother-in-law on July 10, 2013 which has required my complete and undivided personal attention to family related needs.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of July, 2013, at San Jose, California


CHRISTOPHER E. PLATTEN

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner seeks urgent and immediate relief from an order compelling arbitration over issues and under restraints that may later be held invalid and unenforceable. Given the policies underlying the statutory procedure for enforcing arbitration and the grave consequences to the affected employees and the potential for wasted and non-recoverable resources and time, it is self-evident that a stay of arbitration pending determination of the PERB complaint is justified and that the trial court abused its discretion in denying a stay of the arbitration.

This Petition Meets the Requirements for Consideration by the Court.

Petitioner is mindful that the Court will only grant the extraordinary relief requested upon a showing that (1) there is no other adequate remedy at law, such as an appeal or relief from the trial court; (2) petitioner will suffer irreparable injury if the writ is not granted; and (3) petitioner has a beneficial interest in the underlying action. (See, *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266.)

Petitioner meets all three requirements. The trial court's order compelling arbitration is not appealable. (*Atlas Plastering, Inc. v. Superior Court*, supra.) The petitioner will suffer irreparable harm since it will incur significant expense and resource allocation to an interest arbitration procedure which may later be invalidated by proceedings before the PERB and as a result, firefighters represented by the Union may be ultimately left adrift concerning the retirement benefits to which they are entitled. And third, as a party covered by the provisions of San Jose City Charter §§1111 and 1500 et seq. the Union is beneficially interested in this action.

The petition is timely under law. (*Poepelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499; see also, *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356.) Accordingly, the Court should consider the merits of the petition.

Once section 1281.2 has been found to apply, "the trial court's discretionary decision as to whether to stay or deny arbitration is subject to review for abuse." [Citations.] (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

II
***This Petition Should Be Granted Consistent with the Doctrine of
Accommodation and Deference to the PERB's Exclusive
Jurisdiction.***

When confronted with circumstances of conflicting proceedings involving claims to compel arbitration and unfair practices within the PERB's exclusive jurisdiction, this Court and others, have ruled that actions for breach of contract or to compel arbitration should be denied or stayed pending the PERB's resolution of the unfair practice charges. This Appellate District Court has adopted a doctrine of accommodation and deference for the PERB's resolution of the unfair practices, which are within the PERB's exclusive jurisdiction.

In *International Association of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, this Court affirmed the trial court's denial of a petition to compel arbitration. This Court held that because the Union's petition to compel arbitration was based upon the City's refusal to meet and confer regarding the implementation of the Firefighters Procedural Bill of Rights Act (Gov. Code, §§ 3250-3262), which might constitute a violation of the MMBA, the PERB had exclusive jurisdiction over the dispute. (*International Association of Firefighters, Local 230 v. City of San Jose, supra*, 195 Cal.App.4th at pp. 1210-1211.)

This Court rejected the Union's claim that the superior court had concurrent jurisdiction because the Union alleged a breach of contract

subject to Labor Code section 1126, which authorizes enforcement of a collective bargaining agreement in the state courts. (*International Association of Firefighters, Local 230 v. City of San Jose*, supra, 195 Cal.App.4th at p. 1211.) This Court reasoned that an apparent conflict between the jurisdiction of the PERB over unfair practices and the right of the parties to litigate to enforce contract rights, e.g., compel arbitration, requires an accommodation. Justice Bamattre-Manoukian's opinion explained that where the PERB's administrative remedy is adequate to resolve a critical condition precedent to the arbitration claim, the court should defer to PERB's exclusive jurisdiction over the unfair practice. (*Id.* at pp. 1211-1215.)

Justice Bamattre-Manoukian's analysis in the case relies on the earlier decision in *Fresno Unified School Dist. v. National Educators Assn.* (1981) 125 Cal.App.3d 259. There the court determined that it should stay an employer's breach of contract action after the "teachers engaged in a work stoppage" despite a no-strike provision in the parties' collective bargaining agreement (*Id.* at p. 262.) until the PERB determined whether the strike constituted an unfair practice. (*Id.* at pp. 272-274.) The court determined that "the apparent conflict between the jurisdiction of the PERB over unfair practices and the right of the parties to litigate their contractual rights under Labor Code section 1126 requires an accommodation." (*Id.* at p. 272.) The accommodation chosen by the court was to allow the trial

court to stay the contract action pending the PERB's resolution of the unfair practice charges, "which are within its exclusive jurisdiction." (*Id.* at p. 274.)

As Justice Bamattre-Manoukian noted in her opinion in *International Association of Firefighters, Local 230 v. City of San Jose*, *supra*, "[t]he decision in *Fresno Unified School Dist.* was followed in *Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 891-892, in which the court determined that PERB had exclusive initial jurisdiction to the extent the employee association's claims constituted an unfair practice claim. The court also directed a stay of the civil action because a PERB decision might not obviate the claims that the Barstow Unified School District had violated the Education Code." (*International Association of Firefighters, Local 230 v. City of San Jose*, *supra*, 195 Cal.App.4th at p. 1212.)

Taken collectively, these cases establish a principle of deference to the PERB's exclusive jurisdiction to resolve unfair practice claims that may, or may not, obviate the civil actions in superior court. This doctrine of accommodation acknowledges the strong force of the PERB's exclusive jurisdiction. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597; see also, *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 413-414.) Here, the trial court abused its discretion by not accommodating the facial potential

conflict between the PERB complaint asserting the invalidity of Measure B, and the City's petition to compel arbitration in accordance with Measure B. If the PERB upholds the complaint, then the basis for the petition to compel interest arbitration evaporates. Under these circumstances, the trial court abused its discretion in refusing to stay the interest arbitration.

III

The Trial Court Abused Its Discretion By Failing to Acknowledge the Inherent Risk of A Conflicting Ruling by the PERB.

First, "[w]hile there is a strong public policy in favor of arbitration, there is an 'equally compelling argument that the Legislature has also authorized trial courts to . . . stay the arbitration when, as here, there is the possibility of conflicting rulings.'" (*Fitzhugh v. Granada Healthcare & Rehabilitation Center, LCC*, (2007) 150 Cal.App.4th 469, 475.) As the court noted in *Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490, 1497: "The California Supreme Court has explained that Code of Civil Procedure "[s]ection 1281.2(c) is not a provision designed to limit the right of parties who chose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements. . . . " Section 1281.2(c) addresses the peculiar situation that arises when a controversy in a special

proceeding affects the validity of the arbitration agreement and the need to avoid potential inconsistent or conflicting rulings. "The California provision giving the court discretion [to stay arbitration] under such circumstances – in order to avoid potential inconsistency in outcome as well as duplication of effort –" is consistent with the policy of encouraging arbitration." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.)

The Legislature included section 1281.2, subdivision (c) as part of the statutory scheme governing arbitration "so that common issues of fact and law will be resolved consistently, and only once." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 727.)

In 2000, the Legislature extended the PERB's jurisdiction to cover matters arising out of the MMBA – this was done through the enactment of Government Code section 3509, which became effective July 1, 2001. (Stats. 2000, ch. 901, § 8.) "Subdivision (b) of that statute provides, in relevant part: 'A complaint alleging any violation of [the MMBA] . . . shall be processed as an unfair practice charge by [the PERB]. *The initial determination as to whether the charge of unfair practice is justified* and, if so, the appropriate remedy

necessary to effectuate the purposes of this chapter, shall be a matter within the *exclusive jurisdiction* of [PERB].’ . . . This enactment removed ‘from the courts their initial jurisdiction over MMBA unfair practice charges’ [citation] and vested such jurisdiction in PERB. [citation].” (*Operating Engineers*, *supra*, 49 Cal.4th at p. 605.)

It is presumed that when legislation is enacted the public body does so with knowledge of existing laws, both judicial and statutory. “Both the legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws having direct bearing upon them.” [citations omitted]. (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.)

When the Legislature amended the MMBA in 2000 to shift to the PERB exclusive jurisdiction over unfair practice claims, it is presumed that it was aware of the provisions of Code of Civil Procedure section 1281.2(c). The Legislature was thus aware that vesting the PERB with exclusive jurisdiction over unfair practices would inevitably pose conflicts under the statutory scheme for the enforcement of arbitration agreements. Thus, as this Court explained in *International Association of Firefighters, Local 230*, *supra*, the

courts must exercise discretion in favor of a stay in circumstances like those presented here, where the PERB's adjudication of an unfair practice claim warrants a stay of arbitration.

In denying the request for a stay of proceedings until resolution of the PERB complaint, the trial court abused its discretion by focusing only on the indisputable fact that it, not the PERB, had authority under the MMBA (Gov. Code § 3509 subd. (e)), to consider the City's petition to compel interest arbitration. (Appx. at p. 459.) The trial court's order simply fails to consider the practical reality that the PERB complaint on its face poses a risk of conflict with any interest arbitration award under the new limited charter provisions imposed by Measure B. Thus the trial court abused its discretion by failing to acknowledge the risk of a potential conflict posed by the PERB complaint.

IV

The Trial Court Abused Its Discretion by Requiring Proof that the PERB Would Invalidate Measure B.

Second, the trial court's order compelling arbitration rests upon an improper prerequisite to require a stay: positive evidence that the PERB complaint will, without question, be determined in the Union's favor. (Appx. at p. 459.) This is a requirement not encompassed

within the plain language of Section 1281.2 of the Code of Civil Procedure and is at odds with the Legislative intent to accord a stay of arbitration proceedings when the risk of conflicting proceedings militate against the immediate enforcement of arbitration agreements.

The statute is unambiguous: it allows the trial court to stay a motion to compel arbitration whenever the parties are subject to a special proceeding that poses a risk of conflict to the arbitration process or otherwise invalidates the arbitration process outright. The Legislature easily could have included the qualifying language that the trial court infers, requiring a party to show probable success on the merits of the conflicting proceeding. But its failure to do so precluded the trial court from construing the statute to include limitations that the Legislature did not. (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 486.)

The *Whaley* court cited the Senate Committee on the Judiciary's analysis of the bill to examine legislative intent, stating:

"The legislative history broadly defines the problem the Legislature intended to address as follows:

'Where a party to an arbitration agreement is also party to a pending court action or special proceeding,

with such a third party, there may be a possibility of conflicting rulings on issues of law or fact.’ (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1628 (1997–1998 Reg. Sess. [sic]) p. 2, italics added.) Thus, the statute was intended primarily to prevent conflicting rulings resulting from arbitration proceedings and other related litigation arising out of the same transaction.”

(*Whaley*, supra, 121 Cal.App.4th at p. 488, underline added.)

The Senate Committee analysis actually used the word “any” instead of the word “the,” and subsequent legislative analyses accurately quoted the Senate Committee report including the word “any.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1628 (1977–1978 Reg. Sess.) p. 2; Sen. Policy Comm. Materials, Correspondence from Legislative Representative of the State Bar of Cal. re Sen. Bill No. 1628, May 23, 1978, p. 1; Sen. Policy Comm. Materials, Correspondence from Legislative Representative of the State Bar of Cal. re Sen. Bill No. 1628, March 30, 1978, p. 1.) In other portions of the analysis, the Senate Committee stated that the bill applied “[w]here a party to an arbitration agreement is also a party to

a pending court action” and allowed a court to “refuse to enforce the arbitration agreement” or “*stay the arbitration agreement pending resolution of the court action*” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1628 (1977–1978 Reg. Sess.) pp. 1–3, italics added.)

Nowhere does the statute or the legislative history support the trial court’s express requirement that the grant of a stay requires the court to “conclude that [the Union] will be successful” in its PERB authorized complaint. (Appx at p. 459.) “‘The existence of [a] possibility of conflicting rulings on a common issue of fact is sufficient grounds . . .’ to deny a motion to compel pursuant to section 1281.2, subdivision (c). [Citation.]” (*Abaya v. Spanish Ranch I, L.P.*, supra, 189 Cal.App.4th at p. 1499; accord, *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 567 [the relevant issue under § 1281.2, subd. (c) “is not whether inconsistent rulings are inevitable but whether they are possible if arbitration is ordered”].) The trial court failed to recognize that the possibility of conflicting rulings was apparent here, and that this conflict alone justified a stay of arbitration proceedings. Thus, the trial court abused its discretion.

This case presents the classic situation where “[d]ifferent triers of fact in different proceedings could come to different and conflicting

conclusions as to which party or parties were liable, and also could arrive at different conclusions in apportioning the amount of damages.” (See, *Birl v. Heritage Care, LLC*, (2009) 172 Cal.App.4th 1313, 1321-1322 [finding trial court “did not misapply the law or abuse its broad discretion in denying the motion to compel arbitration” where conflicting rulings were possible]; *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC*, *supra*, 150 Cal.App.4th at pp. 475–476 [affirming trial court’s exercise of discretion to deny petition to compel rather than stay arbitration]; see also *C. V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1642 [possibility of conflicting rulings supported denial of petition to compel arbitration brought by one insurance carrier in a pending action involving the allocation of a settlement amount among numerous insurance carriers].)

“[S]ection 1281.2(c) is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California’s statutory scheme designed to enforce the parties’ arbitration agreements” (*Cronus Investments, Inc. v. Concierge Services*, *supra*, 35 Cal.4th at p. 393.) The trial court improperly determined that the statutory

exception did not apply here to stay the interest arbitration. This was an abuse of discretion cured only by this Court granting the petition for writ relief.

Moreover, absent writ relief by this Court, the Union will be required to expend unrecoverable resources, in the form of attorney's fees, arbitrator fees, court reporter fees and expert witness fees in an interest arbitration that will be nullified in its entirety if the PERB upholds the Union's complaint and rules Measure B unlawful and invalid under the MMBA and the holding in *The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.

CONCLUSION

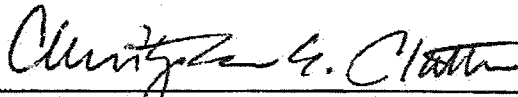
Because of the clear risk of potential conflicting rulings between the interest arbitration panel operating under Measure B and the potential ruling by the PERB invalidating Measure B, the trial court abused its discretion in failing to stay the interest arbitration proceedings. For the reasons articulated above, this Court should issue an immediate stay of proceedings in the trial court and grant the

writ relief requested herein. The emergency petition should be granted.

Dated: July 23, 2013

Respectfully submitted,

WYLIE, McBRIDE,
PLATTEN & RENNER

A handwritten signature in cursive script, appearing to read "Christopher E. Platten", is written over a horizontal line.

CHRISTOPHER E. PLATTEN

Attorneys for Petitioner International Association of
Firefighters, Local 230

CERTIFICATE OF COMPLIANCE

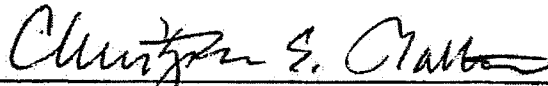
Pursuant to California Rules of Court Rule 8.204

Appellate Case No.: _____

I certify that pursuant to California Rules of Court Rule 8.204, the attached PETITION FOR WRIT OF PROHIBITION, MANDATE OR OTHER APPROPRIATE WRIT RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES IMMEDIATE STAY REQUESTED is proportionately spaced, has a typeface of 13 points or more and contains 6,711 words as counted by the word-processing program used to prepare this brief.

Dated: July 23, 2013

WYLIE, McBRIDE,
PLATTEN & RENNER

A handwritten signature in cursive script, appearing to read "Christopher E. Platten", is written over a horizontal line.

CHRISTOPHER E. PLATTEN

PROOF OF SERVICE
(C.C.P. 1013(3) & 1011)
(Revised 1/1/88)

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States and a resident of Santa Clara County, California. I am over the age of eighteen years and not a party to the within action. My business address is 2125 Canoas Garden Ave., Suite 120, San Jose, CA 95125. On July 23, 2013 I served the **PETITION FOR WRIT OF PROHIBITION, MANDATE OR OTHER APPROPRIATE WRIT RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES**

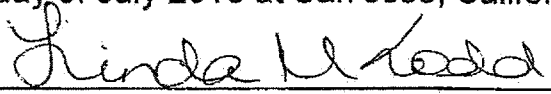
X by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at San Jose, Santa Clara County, California, addressed as set forth below. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Copies mailed to:

Attorney for Respondent	David Kahn, Esq. Renne Sloan Holtzman Sakai LLP 350 Sansome Street, Suite 300 San Francisco, CA 94104
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Superior Court	Hon. Kevin E. McKenney Superior Court of California County of Santa Clara 191 North First Street San Jose, CA 95113
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I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 23rd day of July 2013 at San Jose, California.



LINDA M. TODD

